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No. 97-454

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The United States is responding to the release of hazardous substances at a former chemical manufacturing plant near Muskegon, Michigan, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, which provides a mechanism for financing government cleanups and recovering those costs from responsible parties. In response to the government's cost recovery efforts, the Sixth Circuit has announced a rule that absolves parent corporations of liability, even though they participated in the operation of the facility and share responsibility for the conditions at the site. As we explain in our petition, the court of appeals' decision warrants review because it is erroneous, it conflicts with the decisions of other courts of appeals, and it presents an important issue of corporate liability under CERCLA. Respondents attempt to minimize the waywardness of the court of appeals' decision, the conflict among the circuits,

and the importance of the substantial issues presented. Those attempts fall short of the mark.

1. As our petition explains (Pet. 15-21), the Sixth Circuit's decision erroneously concludes that a corporation that actively participates in and exercises control over a subsidiary's operations cannot be held liable, on that basis, as an "operator" of the subsidiary's facility under Section 107(a)(2) of CERCLA, but will be held liable only if state law requirements for "piercing the corporate veil" are met. That legal standard adopted by the Sixth Circuit is contrary to the plain language of Section 107(a)(2), which imposes direct liability on any person, including a corporation, that "operated" a facility at the time of disposal of a hazardous substance, regardless of that person's ostensible ownership interest in the facility.

a. Respondents contend that this case involves only a fact-bound inquiry into what activities render a parent corporation liable as an operator under CERCLA. See CPC Br. in Opp. 8-13; Aerojet Br. in Opp. 6-11. That contention is at odds with the court of appeals' decision and the question presented in this case. The district court made extensive factual findings in support of its conclusion that CPC and Aerojet actively participated in and exercised control over the operations of their respective subsidiaries at the Muskegon site and, on that basis, held the parent corporations liable as operators under Section 107(a)(2). See Pet. 10-12. The court of appeals' decision does not reject the district court's factual findings, but instead rejects the Section 107 liability standard adopted by the district court, which subjects a corporation to direct liability based on its participation in and actual control over a subsidiary's operation of a facility.

To be sure, if the United States had no legal objection to the standard of operator liability adopted by the Sixth Circuit, then any disagreement we would have that the particular facts in this case do not meet such a standard

would not, without more, warrant further review in this Court. That is not the case here. Contrary to respondents' assertions, our challenge to the Sixth Circuit's decision is not based upon "a particular factual application of accepted legal principles." Aerojet Br. in Opp. 10. Rather, we seek review of the court of appeals' decision because it creates a federal standard of corporate liability under CERCLA that is wrong as a matter of law and that stands in square conflict with the decisions of four other courts of appeals.

b. As our petition explains (Pet. 22-26), four other courts of appeals have interpreted Section 107 to impose liability on corporations that actively participate in and exercise actual control over the operations of their subsidiaries. Rejecting that liability standard, the Sixth Circuit itself acknowledges the conflict. Pet. App. 13a-14a; see *id.* 34a-35a. Hence, Aerojet's assertion (Br. in Opp. 7-10) that there is complete unanimity among the courts of appeals on the question presented is simply wrong.

CPC does not dispute that such a conflict exists. Rather, in CPC's view, the conflict is not "direct" or "deep" enough to warrant resolution by this Court. CPC Br. in Opp. 23-24. We disagree. CPC acknowledges that the First, Third, and Eleventh Circuits, unlike the Sixth Circuit, have embraced a liability standard that holds a parent corporation liable as an operator if the parent corporation exercises "pervasive control" over a subsidiary that owns a facility. *Id.* at 23-25. That some of those circuits have yet to impose "operator" liability on a parent corporation, as observed by CPC, is simply beside the point. At bottom, the liability standard adopted by those three circuits, and that created by the Sixth Circuit, cannot both be correct.

CPC fares no better in its attempt to downplay the significance of the conflict by suggesting that this Court should decline to review the question whether a corpo-

rate or individual shareholder should be subjected to operator liability under CERCLA because the Court has done so previously. See CPC Br. in Opp. 1 & n.1, 9. On those earlier occasions, no circuit conflict existed. To be sure, in *Joslyn Manufacturing Co.* v. *T.L. James & Co.*, 893 F.2d 80 (1990), cert. denied, 498 U.S. 1108 (1991), the Fifth Circuit held that a parent corporation can be held liable only through a corporate veil-piercing standard. The issue in *Joslyn Manufacturing*, however, was whether to "impose direct liability on parent corporations for violations of their wholly-owned subsidiaries." *Id.* at 81. The Fifth Circuit did not address a theory of liability holding a parent corporation liable as an operator based on *its own actions*. Hence, as we previously explained to this Court, and as the First Circuit noted in *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 27 (1990), cert. denied, 498 U.S. 1084 (1991), the Fifth Circuit's decision does not create a conflict among the courts of appeals. See U.S. Br. in Opp. at 12-13, *Kayser-Roth Corp.* v. *United States* (No. 90-816). Respondent Aerojet agrees (Br. in Opp. 7 n.3) and, like the United States (Pet. 26), notes that the Fifth Circuit has since ruled that individual officers and employees may be held directly liable as operators under CERCLA based on their actual participation in the operation of a facility and that "this personal liability is distinct from the derivative liability that results from 'piercing the corporate veil.'" *Riverside Market Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.), cert. denied, 502 U.S. 1004 (1991) (citation omitted). See Aerojet Br. in Opp. 11 n.6.

In fact, contrary to CPC's suggestion that the conflict is not ripe for resolution, the Sixth Circuit has recently decided a CERCLA case that deepens the conflict between the Sixth Circuit and other courts of appeals. In a divided en banc decision, *Donahey* v. *Bogle*, Nos. 92-1128

& 92-1151, 1997 WL 710017 (Nov. 17, 1997), the Sixth Circuit extended the standard for operator liability articulated in the decision at issue here to an individual shareholder of a corporation that owns a facility. Applying the same standard as for parent corporations, the court held that an individual shareholder is not liable as an operator under Section 107(a)(2) of CERCLA "unless circumstances justify piercing the corporate veil." 1997 WL 710017, at *5. The Sixth Circuit thereby expands the conflict among the courts of appeals to the analogous issue of whether individual shareholders may be held liable under CERCLA based on personal participation and actual control. See *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985). Cf. *Sidney S. Arst Co.* v. *Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994); *FMC Corp.* v. *Aero Indus., Inc.*, 998 F.2d 842, 846 (10th Cir. 1993). Sixth Circuit precedent has thus departed even further from the decisions of other courts of appeals with respect to the proper federal standard for operator liability under CERCLA.

c. Nor is there merit to CPC's contention that review by this Court is not warranted because the facts do not support holding CPC liable as an operator even under the standard urged by petitioner. See CPC Br. in Opp. 11-13, 23-29. As our petition explains (Pet. 10-11, 17), the district court set out extensive factual findings in support of its conclusion that CPC actively participated in and exercised control over its subsidiary's business at the Muskegon site and, by doing so, operated the facility in question. While the Sixth Circuit held that the district court had applied the wrong standard of liability, that factual record was left virtually undisturbed by the court of appeals. And, contrary to CPC's assertions, the factual support in this case does not turn on the "mere presence of individuals with CPC affiliations serving in the management and on the board" of its subsidiary. See CPC

Br. in Opp. 27-28. Rather, the evidence demonstrates that corporate officers and board members of CPC and Aerojet did not simply serve as board members and officers of the subsidiaries, but actively participated in and, on behalf of the parent corporations, exerted actual control over the subsidiaries' business, including the operation of the Muskegon facility.[1]

d Similarly unpersuasive is Aerojet's argument that the petition should be denied because resolution of the question presented would not change the ultimate result with respect to its liability. See Aerojet Br. in Opp. 11-16. Aerojet contends that it cannot be held liable under Section 107(a)(2) because no disposal of hazardous substances occurred at the site during its tenure and because it is entitled to the third-party defense under Section 107(b)(3) of CERCLA. Those issues, both of which were remanded to the district court by the Sixth Circuit for further evaluation and factual findings with respect to Aerojet's subsidiaries, are not related to the question presented in this case. Rejecting the Section 107(a)(2) standard advanced by the United States, the court of appeals has fully absolved Aerojet of liability as an operator of the Muskegon site under CERCLA. It is appropriate for this

[1] In a similar vein, CPC accuses the United States of "disingenuous[ly]" claiming that "many parent corporations do not engage in the type of active participation and control shown here." CPC Br. in Opp. 28 n.13. As noted above, the United States does not contend that the *mere presence* of a parent corporation's officers in the management of a subsidiary or on its board is sufficient evidence to establish operator liability. Rather, as the district court found in this case, evidence must exist to show that the corporate officers exercised substantial control over the operations and management of the subsidiary's activities in a way that establishes that those officers participated in the operation of the facility.

Court to consider the question of operator liability as applied to Aerojet, as well as CPC, at this time.[2]

e. CPC argues at length that the court of appeals' decision, which rejects the government's straightforward interpretation of Section 107(a)(2), is correct. See CPC Br. in Opp. 15-23. While there will be time enough to respond to CPC's contentions in a brief on the merits if this Court grants review, we note that CPC's argument is fundamentally flawed because it is based on an erroneous assumption that the statutory text of CERCLA does not express any intention to hold parent corporations or other shareholders directly liable for their activities. As our petition explains (Pet. 15-21), the plain language of Section 107(a)(2) indicates that Congress intended to impose liability on any entity operating a facility, subjecting parties to liability on the basis of their own actions rather than on the basis of their corporate form. The Sixth Circuit's decision erroneously establishes a judicially created exception to Section 107(a)(2)'s federal liability standard by importing state law standards for applying the equitable doctrine of piercing the corporate veil.

2. Nor is there force in respondents' contention that review is not warranted because this case is of "narrow significance." CPC Br. in Opp. 1, 9, 13-15; Aerojet Br. in Opp. 5-6. The court of appeals' interpretation of who constitutes an operator of a facility under Section 107

[2] Accordingly, there is also no merit to CPC's suggestion that review is unwarranted because this case is in an interlocutory posture. CPC Br. in Opp. 10, 15. While the Sixth Circuit directed the district court on remand to make further factual findings and reconsider issues pertaining to the liability of Aerojet's subsidiaries, those issues turn on a factual inquiry that is irrelevant to resolving the question presented by the petition (as the court of appeals' resolution of that question while ordering the remand plainly suggests). The decisions below provide a fully developed factual record for the Court to conduct an inquiry into the proper standard of operator liability under Section 107.

would significantly hamper the United States' efforts to effectuate Congress's mandate of responding to the public dangers posed by hazardous waste sites. Its decision creates an exception to Section 107, absolving parent corporations of liability for their active participation in and control over the operations at hazardous waste sites owned by their subsidiaries. In effect, the court's exception to the liability standard established by Congress in Section 107 creates a disincentive "for those in control of hazardous substances to prevent releases and thus protect the public from harm," S. Rep. No. 848, 96th Cong., 2d Sess. 14 (1980), diminishes the fairness of CERCLA's liability provisions, and shifts the burden of bearing cleanup costs from responsible parties to the innocent public, see Pet. 27-28.

a. Respondents attempt to minimize the significance of this case by noting that *additions* of sites to the National Priorities List (NPL) have decreased. CPC Br. in Opp. 14; Aerojet Br. in Opp. 5-6 n.2. The rate at which new sites are added to the NPL, however, does not reflect the level of activity of the CERCLA program or, more fundamentally, the importance of the issue presented by this case. First, the NPL currently includes more than 1,000 sites. 40 C.F.R. Pt. 300, App. B; see 62 Fed. Reg. 50,442, 50,445 (1997). Cost recovery litigation has not been completed or yet commenced for many sites.[3] Second, although the Environmental Protection Agency (EPA) has examined more than three-quarters of the sites that were placed in EPA's "CERCLIS" inventory of potential NPL sites, more than 10,000 sites

[3] The Environmental Protection Agency referred to the Department of Justice 47 cost recovery cases under Section 107 of CERCLA in fiscal year (FY) 1997, 54 cases in FY 1996, 30 cases in FY 1995, and 42 cases in FY 1994. Currently, the Justice Department has more than 250 cost recovery actions pending in federal district court.

still remain in that inventory.[4] Third, the government may undertake certain response actions at sites that are not even listed on the NPL, see, *e.g.*, 40 C.F.R. 300.415(b)(1), and seek cost recovery for those actions. CPC's contention that it is "safe to assume" that "relevant litigation [has] commenced, if not concluded," under CERCLA is without merit. CPC Br. in Opp. 14.

Furthermore, as we explain in our petition and response to the other petitions in this case, the total government expenditures for cleaning up the hazardous conditions left by the owners and operators of the Muskegon site alone will total many tens of millions of dollars. Pet. 27; U.S. Br. at 6, *Michigan Dep't of Envtl. Quality* v. *CPC Int'l, Inc.* (Nos. 97-296 & 97-464). The court of appeals' decision completely absolves CPC and Aerojet of liability. If that decision is left standing, the public will assume those costs because those corporations are the only responsible parties that can contribute meaningfully to the cleanup of the site. In addition, the United States could be required to forfeit its claims for total response costs exceeding $220 million against parent corporation defendants for several cleanups at other CERCLA sites located within the jurisdiction of the Sixth Circuit.

[4] See *Superfund Reauthorization: Hearings Before the Subcomm. on Water Resources and Environment of the House Comm. on Transportation and Infrastructure*, 105th Cong., 1st Sess. 454 (Apr. 10, 1997). When EPA receives reports of releases or potential releases of hazardous substances at a site, the site is placed on "CERCLIS," the data base for sites to be evaluated for potential response actions and listing on the NPL. Since 1996, EPA has listed approximately 30 additional sites on the NPL, and there is a substantial universe of sites still awaiting assessment, inspection, and NPL listing decisions. See, *e.g.*, 62 Fed. Reg. 50,442 (1997); *id.* at 15,572; 61 Fed. Reg. 30,510 (1996). Some of those sites may eventually be the subject of CERCLA response actions and cost recovery actions.

b. Finally, CPC is mistaken in suggesting that review is unwarranted because CERCLA is currently before Congress for reconsideration and reauthorization. See CPC Br. in Opp. 14-15. As the Court explained in *Braxton* v. *United States*, 500 U.S. 344 (1991), the possibility that Congress may resolve a conflict among the courts of appeals on a question of statutory interpretation is not generally a basis for this Court to refrain from considering the question. On the contrary, the Court ordinarily regards the task of resolving those conflicts "as initially and primarily ours." *Id.* at 348.[5] Accordingly, we believe that it would be appropriate for the Court to consider the question at this time.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

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[5] Indeed, CPC can only speculate that Congress's reconsideration of CERCLA will resolve the specific problem at hand. Congress may reauthorize CERCLA without any amendment addressing the question presented by this petition. We are not aware of any bill pending before Congress at this time that would resolve that question.